PART I · INTRODUCTION AND CONTEXT

Abbreviations

AC	Appeal Cases, Law Reports
All ER	All England Law Reports
BCC	British Company Cases
BCLC	Butterworth's Company Law Cases
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)
BGH	*Bundesgerichtshof* (German Federal Supreme Court)
BGHZ	*Entscheidungen des Bundesgerichtshofs für Zivilsachen* (Decisions of the German Federal Supreme Court in Private Law Matters)
BOE	*Boletín Oficial del Estado* (Official Gazette of the Spanish State)
BW	*Burgerlijk Wetboek* (Dutch Civil Code)
C.	Justinian's Code
Cass.	*Cour de Cassation* (French or Belgian Supreme Court)
Cc	*Code civil* (French or Belgian Civil Code)
C.c.	*Codice civile* (Italian Civil Code), *Código civil* (Spanish or Portuguese Civil Code)
Ch	Law Reports, Chancery Division
Ch App	Chancery Appeals
CMLR	Common Market Law Review (law journal)
Cmnd	Command Paper
D.	Digest
Dalloz	*Dalloz, Recueil hebdomadaire de jurisprudence* (1924–1940)
D.H.	*Dalloz Hebdomadaire*
DZWiR	*Deutsche Zeitschrift für Wirtschaftsrecht* (law journal)
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECJ	European Court of Justice

EEC	European Economic Community
EGBGB	*Einführungsgesetz zum Bürgerlichen Gesetzbuch* (German Introductory Act to the Civil Code)
ER	English Reports
ERPL	European Review of Private Law (law journal)
EU	European Union
ICLQ	International and Comparative Law Quarterly (law journal)
IPRax	*Praxis des Internationalen Privat- und Verfahrensrechts* (law journal)
JCP	*Jurisclasseur périodique* (otherwise known as *La Semaine Juridique), édition générale* (law journal)
JZ	*Juristenzeitung* (law journal)
Lloyd's Rep	Lloyd's Law Reports
LQR	Law Quarterly Review (law journal)
McGill LJ	McGill Law Journal
MJ	Maastricht Journal of European and Comparative Law
NI	Northern Ireland
NIPR	*Nederlands Internationaal Privaatrecht* (law journal)
NJ	*Neue Justiz* (law journal) or *Nederlandse Jurisprudentie Uitspraken in burgerlijke en strafzaken* (law reports)
NJW	*Neue Juristische Wochenschrift* (law journal)
OJ	Official Journal
QB	Queen's Bench
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht* (law journal)
Rdn.	*Randnummer* (paragraph)
Req.	*Chambre des requêtes* of the *Cour de Cassation*
Rev.crit.d.i.p.	*Revue critique de droit international privé* (law journal)
Rev. int. dr. comp.	*Revue internationale de droit comparé* (law journal)
RG	*Reichsgericht* (German Imperial Court)
RGZ	*Amtliche Sammlung von Entscheidungen des Reichsgerichts in Zivilsachen* (Collection of decisions of the German Imperial Court in Private Matters)
RIW	*Recht der Internationalen Wirtschaft* (law journal)
RKO	*Reichskonkursordnung* (German Bankruptcy Act of 1877)
RP	*Das römische Privatrecht*
SA	South Africa
Ses. Cas.	Session Cases, House of Lords
STS	*Sentencia Tribunal Supremo* (case decided by the Spanish Supreme Court)

tit.	titulus, titre
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Unif. L. Rev./Rev. dr. unif.	Uniform Law Review/*Revue de droit uniforme* (law journal)
U.Pa.J.Int'l Econ.L.	University of Pennsylvania Journal of International and Economical Law (law journal)
US	United States Report
Ves.Sen.	Vesey Senior's Reports, Chancery
WLR	Weekly Law Reports
WM	*Wertpapiermitteilungen, Zeitschrift für Wirtschafts- und Bankrecht* (law journal)
WPNR	*Weekblad voor Privaatrecht, Notariaat en Registratie* (law journal)
ZEuP	*Zeitschrift für Europäisches Privatrecht* (law journal)
ZIP	*Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* (law journal)
ZVglRWiss	*Zeitschrift für vergleichende Rechtswissenschaft* (law journal)

1 Introduction: security rights in movable property within the common market and the approach of the study

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The topic of 'Security Rights in Movable Property' does not need a long introduction. Earlier comparative studies in this field[1] have shown the divergencies with respect to both principle and the practical outcome of cases. Therefore, and because of the pressing need for some measure of harmonisation, it is not surprising that the Common Core Project has chosen the topic as one of its first sub-projects. The task of exploring in greater detail the similarities and differences between the European

[1] See foremost the study by Ulrich Drobnig carried out on behalf of UNCITRAL, published as Report of the Secretary-General: study on security interests (A/CN.9/131) Annex, UNCITRAL Yearbook 1977, part two, II. A. Cf. further Ulrich Drobnig, 'Recht der Kreditsicherheiten', in: Europäisches Parlament, Generaldirektion Wissenschaft (ed.), *Arbeitsdokument: Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuches*, JURI 103 DE (1999) 59 (70 ff.); Ulrich Drobnig, 'Security Rights in Movables', in: Arthur Hartkamp et al. (eds.), *Towards a European Civil Code* (2nd edn, 1998) 511 ff.; Ulrich Drobnig, ERPL 2003, 623 ff.; Karl Kreuzer (ed.), *Mobiliarsicherheiten – Vielfalt oder Einheit?* (1999); Sixto Sánchez Lorenzo, *Garantías reales en el comercio internacional* (1993); Herbert Stumpf, *Eigentumsvorbehalt und Sicherungsübertragung im Ausland* (4th edn, 1980); Anna Veneziano, *Le garanzie mobiliari non possessorie* (2000); and the series *Recht der Kreditsicherheiten in den europäischen Ländern* edited by Walther Hadding and Uwe Schneider (from 1978). Specifically on retention of title: Eva-Maria Kieninger, *Mobiliarsicherheiten im Europäischen Binnenmarkt* (1996) 41 ff.; Stefan Leible, 'Der Eigentumsvorbehalt bei Warenlieferungen in EU-Staaten', in: *Praxis-Handbuch Export*, Gruppe 6/7, 1 ff.; Theophile Margellos, *La protection du vendeur à crédit d'objets mobiliers corporels à travers la clause de réserve de propriété, Étude de droit comparé* (1989); P. L. Nève, *Eigendomsvoorbehoud*, Nederlandse Vereniging voor Rechtsvergelijking no 60 (2000) 1 (19 ff.); Jacobien W. Rutgers, *International Reservation of Title Clauses* (1999) 13 ff. There are also a large number of studies concentrating on one or two jurisdictions, such as, for example, Stefanie Hellmich, *Kreditsicherungsrechte in der spanischen Mehrrechtsordnung* (2000); Martin Menne, *Die Sicherung des Warenlieferanten durch den Eigentumsvorbehalt im französischen Recht* (1998); and Ulrike Seif, *Der Bestandsschutz besitzloser Mobiliarsicherheiten im deutschen und englischen Recht* (1997).

legal systems in the field of security over movables will be undertaken in Part II of this study. The purpose of the following short introduction is to summarise the economic reasons behind the creation of security interests, to give a short overview of the main divergencies and the problems that are created for international and more specifically for intra-community trade through such divergencies combined with the present rules of private international law, and to outline the previous attempts at harmonisation and unification as well as the main arguments usually advanced against their feasibility (part A). Part B will explain the specific approach of the present study which not only differs from the usual type of comparative investigation but also deviates – albeit to a lesser extent – from other studies within the Common Core Project.

A. A short survey of the status quo

I. Economic reasons for the existence of security rights[2]

Security rights enhance the probability that a creditor will receive repayment of his loan, particularly in the event of insolvency. Usually, the creditor will therefore charge a lower interest rate or might extend credit more readily if the debtor is able to give collateral. Thus, a functioning system of security rights is not only beneficial for creditors but also for debtors, since it lowers the price of borrowing. At the macroeconomic level, this means that the amount of low-cost credit and hence the amount of capital that can be used in productive processes will generally be enhanced through a well-designed law on secured transactions. These functions of security rights have been studied both theoretically and empirically.[3] Yet, the basic recognition of the beneficial functions of security rights is not solely due to the advent of economic analysis, nor is it a modern realisation. As the *Corpus Iuris Civilis* said: '*Pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magius ei in tuto sit creditum*.'[4]

In fact, all projects for a reform or harmonisation of the law on secured transactions invariably start from the proposition that a

[2] The critical remarks on the economic usefulness of security rights rest on a contribution to this chapter by George L. Gretton.

[3] Cf. Röver, *Vergleichende Prinzipien dinglicher Sicherheiten* 105 ff. with multiple references, especially to studies carried out by Heywood Fleisig. See also Saunders/Srinivasan/Walter/Wool, U.Pa.J.Int'l Econ.L. 20 (1999) 309 (310 ff.).

[4] *Justiniani Institutiones* 3,14,4. 'A security is given for the benefit of both parties: of the debtor in that he can borrow more readily, and of the creditor in that his loan is safer.'

well-designed, harmonised or uniform law would enlarge the range of available low-cost credit and would therefore be economically beneficial to trade and industry in the individual jurisdiction or in the area where the harmonisation measure would be applicable.[5] This rests not only on the higher probability that a secured creditor will receive repayment of his loan plus interest but also on the ability of security rights to overcome problems of asymmetric information:[6] debtors are usually in a better position than their creditors to know whether they will be willing and able to meet their obligations. The interest rate as such is not able to signal willingness and ability to pay. Creditors do not know whether acceptance of a higher interest rate rests on the profitability of the undertaking or on the fact that the debtor is prepared to take a greater risk. It is likely that a higher interest rate drives the more trustworthy debtors out of the market, a fact that will be anticipated by creditors. Thus, the amount of available credit may decrease as a consequence of a higher interest rate, although usually the amount of goods offered increases with the price. Security rights may overcome this problem by enabling the creditor to inform himself better about the debtor's creditworthiness.

The present study, which concentrates on the search for a common core among the laws of the EU Member States in the area of secured transactions, is certainly not the place to discuss in any depth the economic justifications for the existence of secured transactions in general.[7] However, it should not be overlooked that there exists also a substantial amount of literature which questions the assumption that security rights are economically beneficial.[8] While it can safely be said that a secured transaction either benefits the two contracting parties or at least does not harm their interests, the picture changes once the interests of other, unsecured creditors are taken into consideration. The central purpose of a security right is to confer on the secured creditor a priority as against other creditors or, as Lynn LoPucki has put it: 'Security is an

[5] See most recently 'Security Interests', Note by the UNCITRAL secretariat prepared for the thirty-fourth session, A/CN.9/496, paras. 11 ff. Cf. also the preamble of the draft convention on assignment of receivables in international trade, A/CN.9/486 Annex I; Fleisig, Unif. L. Rev./Rev. dr. unif. (1999) 253.

[6] Cf. Röver, *Vergleichende Prinzipien dinglicher Sicherheiten* 116 f. As to the problem of adverse selection in general, see Akerlof, *Quarterly Journal of Economics* 84 (1970) 488.

[7] As to the necessity of harmonisation, see *infra*, IV.

[8] For an overview, including an extensive bibliography, see Bowers, in: Bouckaert/de Geest, *Encyclopedia of Law and Economics*, vol. II.

agreement between A and B that C take nothing.'[9] Because of this negative externality, other creditors or potential creditors will naturally react so as to minimise the harm. As Alan Schwartz has written: 'Secured creditors will charge lower interest rates because security reduces their risks, but unsecured creditors will raise their rates because security reduces the assets on which they can levy, and so increases their risks.'[10] Hence, in his opinion, debtors will not make an overall net gain from security. Some authors have gone even further, and have argued that security does not merely operate to reallocate value from some creditors to others, but is actually sub-optimal in terms of efficiency. Thus John Hudson has argued that banks which can conveniently lend on a secured basis 'will inevitably be led into making loans that, from the point of view of the economy as a whole, cannot be justified and result in a misallocation of resources'.[11]

As stated earlier, this book and its introduction do not seek to advance this debate. Yet an awareness of the detrimental effects which secured transactions might arguably have on unsecured creditors is helpful for understanding the restrictions that presently exist in Member States' laws. For any future European legislation, it will no doubt be essential to get a clear picture of the economic advantages and possible disadvantages of any suggested regime of security rights.

II. Security rights in movable property: main divergencies

The roots of the present heterogeneity go back to the nineteenth century. As explained in greater detail below by Willem Zwalve,[12] at that time the European jurisdictions came to disapprove of the Roman law hypothec and of practices which allowed the establishment of a pledge with only a theoretical or constructive dispossession on the part of the pledgor. The range of available security rights in movables was thus effectively reduced to the possessory pledge. Yet, at the same time, the industrial revolution brought about an enormous increase in the demand for credit in trade and industry, which could not be met solely through security rights *in personam* and rights in immovable property. It goes without saying that the possessory pledge of movables was ill-equipped to meet

[9] LoPucki, *Virginia Law Review* 80 (1994) 1887 (1899).
[10] Schwartz, *Vanderbilt Law Review* 37 (1984) 1051.
[11] Hudson, *International Review of Law and Economics* 15 (1995) 47 (61).
[12] See *infra*, chapter 2, Zwalve, 'A labyrinth of creditors: a short introduction to the history of security interests in goods'.

that need because it immobilises the goods which the debtor needs for carrying on his business, be it machines or other equipment, stock-in-trade, raw materials or semi-finished products. One of the reasons for the present divergencies lies in the fact that the jurisdictions in question responded to the same economic imperative to differing extents and by the adoption of different legal models.

In some jurisdictions the legislature stepped in and created special registered security rights, based on the idea of a pledge but where a registration requirement replaced the need for the pledgor to surrender actual possession of the collateral. This route was followed in France where a wide array of special charges was created over the decades. Some of these charges are designed to support certain branches of trade or industry such as, for example, the various *warrants*[13] or the *gage sur véhicule automobile*[14] (the latter introduced to stimulate car sales, when retention of title was still considered to be invalid in circumstances of the buyer's insolvency), or, to take a last and most peculiar example, the *nantissement des cinématographiques*.[15] Other charges are of a wider application, as, for example, the *nantissement de l'outillage et du matériel d'équipement* or the *nantissement de fonds de commerce* under which all equipment, inventory and intangible rights such as patents and trademarks of an enterprise can be used as collateral.[16] In principle, Belgium, Luxembourg, Italy and Spain followed the French example but their respective range of special security rights remained more modest. In Belgium, the two kinds of charges which are perhaps most important in practice are the statutory preference of the unpaid seller (*privilège du vendeur*)[17] and the *nantissement sur fonds de commerce*.[18] Italian law knows a special hypothec over motor vehicles (*privilegio sull'autoveicolo*)[19] and machinery (*privilegio del venditore di macchine*),[20] whereas the Spanish legislature has opted for a more

[13] See *infra*, French report, case 11.
[14] See *infra*, French report, case 5(c) on the *Loi Malingre*.
[15] Law of 22 Feb. 1944. See further Fargeaud, *Le gage sans dépossession comme instrument de crédit et le Marché Commun* 71 ff.
[16] See in greater detail *infra*, French report, case 11.
[17] See *infra*, Belgian report, case 1(a). The preference has been extended to all sellers and the former restriction on sellers of machines and similar professional equipment has been abolished. The requirement of registration which likewise existed until 1 Jan. 1998 (the date on which the new Bankruptcy Act entered into force) has been removed as well.
[18] See *infra*, Belgian report, case 11.
[19] See article 2810(3) C.c. and *decreto legge* 15 Mar. 1927, no 436. See further *infra*, Italian report, case 10(a).
[20] Article 2762 C.c. See further *infra*, Italian report, case 3(c).

comprehensive form of hypothec through the Act on non-possessory pledges and hypothecs in movables (*ley sobre prenda sin desplazamiento y hipoteca mobiliaria*).[21] With the recent exception of the Belgian *privilège du vendeur*,[22] all these rights depend – at least for their enforceability as against third parties – on some form of registration. As a consequence, the courts denied in principle the validity or at least the opposability of security rights which were not contemplated by the legislature but created by practice on the basis of ownership, such as, for example, security transfer of ownership and retention of title. Thus, prior to a change in the respective Insolvency Acts in 1980 (France)[23] and 1998 (Belgium),[24] French and Belgian courts held retention of title to be invalid in the buyer's insolvency.[25] The security transfer of ownership is still viewed as 'inopposable' in both jurisdictions,[26] and in Italy[27] and Spain its admissibility is disputed.[28]

In Germany and to a lesser extent in Greece, Austria and the Netherlands, legal developments took a different course. Apart from special registrable charges on ships, airplanes, agricultural inventory and overseas cables,[29] the German legislature did not introduce any non-possessory security rights. Instead, the courts have since various decisions of the *Reichsgericht* in the 1880s[30] accepted security transfer of ownership as valid and enforceable in conflicts with third parties. This case law was upheld after the BGB entered into force,[31] although §§ 1205, 1253 BGB unambiguously state that the constitution of a pledge requires the transfer of actual possession and that the rights of the pledgee terminate upon the return of the collateral. Security assignments of claims were

[21] Act of 16 Dec. 1954, BOE no 352 of 18 Dec. 1954. See further Stefanie Hellmich, *Kreditsicherungsrechte in der spanischen Mehrrechtsordnung* 80 ff.
[22] See *supra*, note 17.
[23] *Loi Dubanchet*, *loi* 80–335 of 12 May 1980. See French report, case 3(a).
[24] See *supra*, note 17.
[25] See for France Cass. 28 Mar. 1934 and 22 Oct. 1934, published together in Dalloz 1934 Jurisprudence 151 (note Vandamme). See for Belgium Cass. 9.2.1933, Pasicrisie 1933, I, 103.
[26] See *infra*, French and Belgian reports, case 10(a).
[27] See *infra*, Italian report, case 7(a). Cf. further Bussani, ERPL 1998, 23 (45) and Kieninger, *Mobiliarsicherheiten im Europäischen Binnenmarkt* 103.
[28] See Hellmich, *Kreditsicherungsrechte in der spanischen Mehrrechtsordnung* 85 ff.
[29] For details see Drobnig, 'Security over Corporeal Movables in Germany', in: J. G. Sauveplanne (ed.), *Security over Corporeal Movables* (1974) 181 at 187 ff.
[30] Cf. RG 9 Oct. 1880, RGZ 2, 168; RG 17 Mar. 1885, RGZ 13, 298 (on the basis of the French *Code civil*); RG 10 Jan. 1885, RGZ 13, 200; RG 2 June 1890, RGZ 26, 180. See also *infra*, chapter 2, Zwalve, 'A labyrinth of creditors', pp. 50 f.
[31] Cf. RG 8 Nov. 1904, RGZ 59, 146. See also *infra*, German report, case 10(a).